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March 31, 2005
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re MeshNetworks, Inc.

Serial No. 76365791

Carolyn E. Knecht of Motorola, Inc. for MeshNetworks, Inc.¹

Anne Madden, Trademark Examining Attorney, Law Office 103
(Michael Hamilton, Managing Attorney).

Before Chapman, Bucher and Holtzman, Administrative
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

MeshNetworks, Inc. seeks registration on the
Principal Register of the mark MESHNETWORKS for services
recited in the application, as amended, as follows:

"wireless broadband services, namely, providing
voice, data, streaming media, and geolocation
via wireless means such as personal digital

¹ The prosecution of this application was handled by Antigone E. Juvelis of Roylance Abrams Berdo & Goodman, L.L.P., for applicant MeshNetworks, Inc. from the time of filing the application through the filing of the appeal brief. While the revocation of power of attorney to Mr. Juvelis and the appointment of Ms. Knecht suggests that Motorola Inc. has acquired MeshNetworks, an assignment has not yet been recorded with the Assignment Branch of the United States Patent and Trademark Office.

assistants, personal computers, and cellular telephones," in International Class 38.²

This case is now before the Board on appeal from the final refusal of the Trademark Examining Attorney to register this mark based upon Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d). The Trademark Examining Attorney has taken the position that applicant's mark, when used in connection with the recited services, so resembles the mark MESHNET registered in connection with the following goods and services, as to be likely to cause confusion, to cause mistake or to deceive:

"integrated voice communication and information distribution networks in the field of voice and data transmission between vehicles, within vehicles and between vehicles and ground stations, comprising transmitters, receivers, processors and computer software," in International Class 9;

"data and voice telecommunications services, namely, the transmission of integrated voice and data information via fiber optic cable, telephone and wireless means," in International Class 38; and

"design for others of integrated voice communications and data information distribution systems comprised of a user controlled device, a vehicle access unit, a portable data terminal,

² Application Serial No. 76365791 was filed on February 4, 2002 based upon applicant's allegation of use in commerce since at least as early as February 2000. Throughout much of the prosecution of this application, it was a combined class application, also including a listing of goods in International Class 9. Immediately prior to this appeal, applicant deleted this class from the application over an informality (not related to the likelihood of confusion refusal herein) raised by the Trademark Examining Attorney.

and network management software," in International Class 42.³

The Trademark Examining Attorney and applicant have filed appeal briefs in the case. Applicant did not request an oral hearing before the Board.

We affirm the refusal to register.

In arguing for registrability, applicant contends that confusion is not likely because: the marks, when considered in their entireties, present different commercial impressions; technology-related marks are granted a narrow scope of protection; purchasers exercise a high degree of care in selecting communications services; and applicant's services and registrant's goods and services are distinguishable.

By contrast, the Trademark Examining Attorney contends that applicant's mark and registrant's mark create similar commercial impressions; that applicant's services are closely related to all of registrant's goods and services; and that both applicant and registrant presumably market their respective services (i.e., the provision of data and voice via wireless means) through the same channels of trade.

³ Reg. No. 2068190 issued on June 10, 1997, Section 8 affidavit accepted and Section 15 affidavit acknowledged.

Our determination under Section 2(d) is based upon an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relationship of the goods and/or services. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to a consideration of the marks, the Trademark Examining Attorney contends that it is significant that applicant's mark and registrant's mark both contain variations of the wording MESHNET. Both MESHNET and MESHNETWORKS are presented in standard character (typed) drawings. The Trademark Examining Attorney argues that the term "mesh" is arbitrary for the listed telecommunications goods and services.⁴ The Trademark Examining Attorney demonstrates from various reference materials that the term "net" is recognized

⁴ We note that applicant has not challenged this position, and the record contains no references to any technological advances known as "wireless mesh networks."

shorthand for the longer term "network" in the fields of computers and/or telecommunications.

By contrast, applicant argues as follows:

The refusal of registration engages in improper dissection of Applicant's mark by comparing only the 'MESHNET' portion of Applicant's mark and ignoring the presence of the term 'WORKS.' Contrary to the analysis set forth in the refusal, Applicant's compound, unitary mark consists of the term 'MESH' and the term 'NETWORKS.' The term 'WORKS' is a key element of Applicant's mark and is entitled to at least as much consideration as the other elements of the mark. Furthermore, the fact that Applicant's mark consists of three syllables, while the cited mark consists of two syllables, also makes confusion unlikely. [citation omitted]. The addition of the term 'WORKS' and the presence of an extra syllable in the Applicant's mark readily distinguish it from the cited mark. When the marks are properly considered in their entirety, the differences between them are significant enough to avoid any confusion.

On this factor, we agree with the Trademark Examining Attorney that the respective marks, MESHNET and MESHNETWORKS, when considered in their entirety, present quite similar overall commercial impressions. They have identical connotations in the field of telecommunications inasmuch as the term "net" is a well-known and readily recognizable shorthand for the term "network." While the differences between the two syllables of the cited mark and the three syllables in

applicant's mark do create minor variations in the sound and appearance of the respective marks, this slight difference is insignificant when contrasted with the substantial similarity in meaning or connotation.

As to a related du Pont factor focusing on the number and nature of similar marks in use on similar goods, as noted earlier, the Trademark Examining Attorney has argued that the word "mesh" is arbitrary as applied to these goods, and applicant has not suggested there are others in the same or closely-related fields using variations on "Mesh," "Mesh net" or "Mesh networks." Accordingly, we must presume the cited mark is a strong mark entitled to a broad scope of protection.

Turning next to a consideration of the respective goods and services, we note that applicant and registrant are providing goods and services involving the transmission of voice and data via wireless means. Nonetheless, applicant argues in its appeal brief, p. 8, that the respective services are different:

Confusion is not likely in the instant case because Applicant's services and those identified in the cited registration are distinguishable. The cited registration specifically identifies communications systems between vehicles. However, Applicant's services consist of a self-forming, self-healing wireless network that, unlike the services in the cited

registration, is not limited to communication between vehicles. In fact, Applicant's services can be used for communications between people, machines, and sensors, among other applications.

Further, in contrast to the cited registration, Applicant's mark is used in connection with geolocation applications which enable devices to ascertain their proximity to other devices either by determining their relative location to other devices or by determining their absolute location in space. Applicant designs and develops technology that provides these capabilities and sells this technology to entities that integrate the technology into a network solution. Applicant's services have much broader applications than and perform additional functions from those identified in the cited registration. Since the services offered under Applicant's mark and the cited mark can be readily distinguished, confusion is not likely.

Applicant relies upon cases of the Board in which confusion was not found with respect to various computer hardware and software products. Yet applicant quotes from In re Quadram Corp., 228 USPQ 863, 865 (TTAB 1985) for the conclusion that "... the Board recognizes that similar marks may coexist without confusion when used in connection with technology and computer products and services..."⁵ We do not agree that our case law supports the broad proposition

⁵ Similarly, applicant cites to Reynolds and Reynolds Co. v. I.E. Systems Inc., 5 USPQ2d 1749, 1752 (TTAB 1987) [finding no confusion between registrant's family of ACCU- marks for accounting-related computer programs and applicant's ACCULINK software for "asynchronous data communication terminal emulation system" software, sold to a very narrow class of purchasers].

as stated by applicant, that "technology-related marks are granted a narrow scope of protection." We have, however, held that "a *per se* rule relating to source confusion vis-à-vis computer hardware and software is simply too rigid and restrictive an approach and fails to consider the realities of the marketplace." Quadram Corp., *supra*; and Electronic Data Systems Corp. v. EDSA Micro Corp., 23 USPQ2d 1460, 1463 (TTAB 1992). Moreover, we note that the Quadram Corp. case involved very specialized and specific hardware and software products, unlike the more broadly-described wireless telecommunications services recited in the cited registration.

Furthermore, consistent with "the realities of the marketplace," Quadram Corp., *supra*, it is not necessary that the goods or services be identical or even competitive in nature in order to support a finding of likelihood of confusion. It is sufficient that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under circumstances that would give rise, because of the marks used in connection therewith, to the mistaken belief that the goods originate from or are in some way associated with the same source. In re International

Telephone and Telegraph Corp., 197 USPQ 910 (TTAB 1978).

Further, the identifications of goods and/or the recitations of services in the application and the cited registration control the comparison of the goods and/or services. See Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987)

["[T]he question of likelihood of confusion must be determined based on an analysis of the mark as applied to the goods and/or services recited in applicant's application vis-à-vis the goods and/or services recited in [the] registration, rather than what the evidence shows the goods and/or services to be."]; and In re Elbaum, 211 USPQ 639 (TTAB 1981).

When the goods and services are compared in light of the legal constraints cited above, we find that applicant's wireless broadband services such as providing for voice and data transmissions are related to registrant's voice and data telecommunications network services and software and services involving designing such telecommunication systems for others. For purposes of the legal analysis of likelihood of confusion herein, it is presumed that registrant's registration encompasses all goods and services of the nature and type identified,

that the identified goods and services move in all channels of trade that would be normal for such goods and/or services, and that the goods and/or services would be purchased by all of the usual classes of potential customers. In re Linkvest S.A., 24 USPQ2d 1716 (TTAB 1992); and In re Elbaum, *supra* at 640. There are no limitations in registrant's recitation of services in International Class 38, and thus, we must presume that registrant's data and voice telecommunications services via wireless means may also be used in connection with personal digital assistants, personal computers, and cellular telephones.

Applicant's argument that its services offered under the MESHNETWORKS mark are offered through "highly specialized trade channels" is unpersuasive because the recitation of services does not have any limitations on applicant's channels of trade.

As to differences in the identification of goods and respective recitations of services, it is true that registrant's goods in International Class 9 and its services in International Class 42 focus on computer hardware, computer software and consultation services offered in conjunction with *telecommunication applications*

for "vehicles." However, registrant's International Class 38 services are not, on their face, similarly restricted to use with *vehicles*. Moreover, even if we were, by implication, to limit registrant's International Class 38 services to 'telecommunication involving vehicles,' and if we were to conclude thereby that applicant's services are not, on their face, identical to registrant's services, we would find that the respective services are still closely related, and still overlapping. That applicant's technologies may have broader applications than do registrant's technologies does not mean potential consumers will not mistakenly view one service as a logical extension of the other. Rather, we find that purchasers familiar with registrant's wireless telecommunications network services, computer hardware and software marketed under the mark MESHNET would be likely to believe, upon encountering applicant's wireless broadband services of providing for voice and data transmissions offered under the nearly identical mark MESHNETWORKS, that the services originated with or were somehow associated with or sponsored by the same entity.

As to the du Pont factor focusing on the conditions under which and buyers to whom sales are made, applicant

argues that its services offered under the MESHNETWORKS mark are offered through "highly specialized trade channels to an extremely sophisticated class of purchasers." Applicant then concludes that inasmuch as " ... consumers exercise a high degree of care in purchasing expensive and sophisticated communications services, they will readily distinguish between the services offered under Applicant's mark and the cited mark and confusion is not likely."

However, no evidence has been proffered in support of applicant's contentions as to the extremely high average cost of these goods and services, with the attendant conclusion that purchasers will all exercise a high degree of care in making the purchasing decision, or in support of the proposition that all of applicant's customers comprise an "extremely sophisticated class of purchasers." We may infer, for example, from applicant's and registrant's respective recitations of services, that these transactions between applicant or registrant and their customers are *not* impulse purchases. However, the fact that one of applicant's (or one of registrant's) current customers may be aware of the source of those services does not eliminate the possibility of confusion.

As noted by the Trademark Examining Attorney, the fact that purchasers are sophisticated in a particular field does not necessarily mean that they are knowledgeable in the field of trademarks or immune from source confusion. In re Decombe, 9 USPQ2d 1812 (TTAB 1988); and In re Pellerin Milnor Corp., 221 USPQ 558 (TTAB 1983).

While this du Pont factor may well be scored in applicant's favor, we do not find that it outweighs all the other du Pont factors favoring the position of the Trademark Examining Attorney. In view of the cumulative effect of the similarity in the marks, the close relationship of the identified goods and/or services, and the same or overlapping channels of trade and classes of purchasers, we find that confusion is likely to occur.

Finally, if we had any doubts regarding whether there is a likelihood of confusion, we resolve them in favor of the prior registrant and against the newcomer. Kenner Parker Toys v. Rose Art Industries, 963 F.2d 350, 22 USPQ2d 1453, 1458 (Fed. Cir. 1992).

Decision: The refusal to register based upon Section 2(d) of the Lanham Act is hereby affirmed.